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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

IN THE MATTER OF DAVID L. SMITH

PETITION FOR A WRIT OF CERTIORARI

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether by affirming the District Court disciplinary panel's reciprocal discipline order indefinitely suspending Mr. Smith from the practice of law in the District Court on the basis of the Tenth Circuit disciplinary panel's prior order indefinitely suspending him from the practice of law in the Tenth Circuit, where this prior order was issued without giving him the evidentiary hearing required by Fed. R. App. P. 46, the Tenth Circuit hearing panel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, without due process of law.

Whether the Tenth Circuit hearing panel also so far departed from the accepted and usual course of judicial

proceedings or so far sanctioned such procedure by the District Court disciplinary panel as to call for the exercise of the Supreme Court's power of supervision.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

IN THE MATTER OF DAVID L. SMITH

PETITION FOR A WRIT OF CERTIORARI

David L. Smith hereby files his Petition for a Writ of Certiorari:

OPINIONS BELOW

Order and judgment issued by a three-judge hearing panel of the United States Court of Appeals for the Tenth Circuit on February 16, 1996 affirming the District Court disciplinary panel's (February 10, 1995) reciprocal discipline order on the basis of the Tenth Circuit

disciplinary panel's (November 29, 1993) order.

Reciprocal discipline order issued by a three-judge disciplinary panel of the United States District Court for the District of Colorado on February 10, 1995 indefinitely suspending Mr. Smith from the practice of law in the District Court on the basis of the Tenth Circuit disciplinary panel's (November 29, 1993) order.

Order issued by a three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit on November 29, 1993 indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit.

Order issued by the Tenth Circuit hearing panel on April 2, 1996 denying Mr. Smith's petition for rehearing and

suggestion for rehearing en banc of its (February 16, 1996) order and judgment.

Order concerning post-hearing motions issued by the District Court disciplinary panel on May 2, 1995.

JURISDICTION

28 U.S.C. § 1254 is the statute believed to confer jurisdiction on the Supreme Court to review this case on certiorari.

CONSTITUTIONAL PROVISION AND RULE OF PROCEDURE INVOLVED IN THE CASE

The Fifth Amendment to the Constitution of the United States provides:

> . . . [N]or shall any person be . . . deprived of life, liberty, or property, without due process of law. . . .

Fed. R. App. P. 46 provides:

(a) . . . .

(b) Suspension or Disbarment.--When it is shown to the court that any member of its bar . . . has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(c) Disciplinary Power of the Court Over Attorneys.--A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

[Emphasis added.]

STATEMENT OF THE CASE

On February 16, 1996, a three-judge hearing panel of the United States Court of Appeals for the Tenth Circuit issued its order and judgment affirming the reciprocal discipline order issued by a three-judge disciplinary panel of the United States District Court for the District of Colorado on February 10, 1995. In its reciprocal discipline order, the District Court disciplinary panel indefinitely suspended Mr. Smith from the practice of law in the District Court on the basis of the order issued by a three-judge disciplinary panel of the Tenth Circuit on November 29, 1993. In this order, the Tenth Circuit disciplinary panel indefinitely suspended Mr. Smith from the practice of law in the Tenth Circuit without giving him the

evidentiary hearing required by Fed. R. App. P. 46.

ARGUMENT

In the context of attorney disciplinary proceedings, as in other contexts, due process requires fair notice of the charges and an adequate opportunity to be heard prior to the entry of a final judgment. See In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Razatos v. Colorado Supreme Court, 746 F.2d 1429

(10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990).

By affirming the District Court disciplinary panel's reciprocal discipline order indefinitely suspending Mr. Smith from the practice of law in the District Court on the basis of the Tenth Circuit disciplinary panel's prior order indefinitely suspending him from the practice of law in the Tenth Circuit, where this prior order was issued without giving him the evidentiary hearing required by Fed. R. App. P. 46, the Tenth Circuit hearing panel deprived him of his

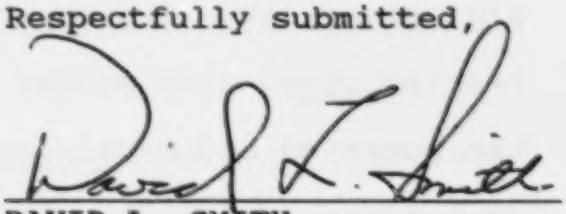
liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, without due process of law. The Tenth Circuit hearing panel also so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by the District Court disciplinary panel as to call for the exercise of the Supreme Court's power of supervision.

V. CONCLUSION

Mr. Smith requests the Supreme Court to grant his petition for a writ of certiorari, and such other and further relief as may be just under the circumstances, including a reversal of the orders indefinitely suspending him

from the practice of law in the District Court and the Tenth Circuit, and a declaration that these orders were null and void ab initio.

Respectfully submitted,



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APPENDIX

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United States Court of Appeals
for the Tenth Circuit

IN THE MATTER OF DAVID L. SMITH, Attorney-Appellant.	)	Nos. 95-1091 & 95-1119 (D.C. No. 93-DP-28) (D. Colo.)

ORDER AND JUDGMENT[1]

Before Tacha, Logan, and Kelly,
Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument

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[1]This order and judgment is not binding precedent, except under the doctrine of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This appeal is from an order of the three-judge disciplinary panel of the United States District Court for the District of Colorado. Appellant Smith appeals pro se on numerous grounds relating to his suspension from the practice of law before this court and before the United States District Court for the District of Colorado. Appellant raises numerous grounds for his appeal relating to the application of local rules of the district court, the denial of due process in the procedures of that court and this court, and various

allegations relating to the proceedings that resulted in suspension from the practice of law before the district court and this court.

This disciplinary matter has a long history in this court and in the district court. In November of 1993, a three-judge disciplinary panel of this court issued an order suspending appellant from the practice of law before the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993) (per curiam), cert. denied, 115 S.Ct. 53 (1994). Following his suspension before the Tenth Circuit, the United States District Court for the District of Colorado conducted hearings, took evidence, and reviewed records related to the actions underlying the disciplinary proceedings. The arguments that Mr. Smith makes again on appeal are,

in large measure, a renewed effort to bring before this court matters that were determined previously in the original disciplinary proceeding. Appellant further alleges on appeal that various district court judges from the United States District Court in Colorado have imposed unjust and harsh sanctions against him. Finally, appellant urges that his counsel Mr. Figa, who has withdrawn from this case, failed to represent appellant competently in connection with all of the disciplinary actions. We find no merit in any of the arguments made on appeal. We approve the disciplinary order issued by the district court for substantially the reasons given in its post-hearing order. This court recently disbarred Mr. Smith for his failure to abide by previously entered

orders. In re Smith, No. 93-631 (10th Cir. Feb. 13, 1996) (per curiam). Continued attempts by this appellant to further litigate matters already determined by this court or foreclosed by previous determinations could result in the imposition of sanctions. AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Disciplinary Action No. 93-DP-28

IN THE MATTER OF DAVID L. SMITH

DISCIPLINARY ORDER

On February 2, 1995, this matter was heard before the Disciplinary Panel of this Court. After hearing arguments and statements of counsel, reviewing all transcripts, exhibits and other documents in this matter, and considering carefully the issues, it is

ORDERED that identical discipline will be imposed by the United States District Court as was imposed by the United States Court of Appeals for the Tenth Circuit. It is

FURTHER ORDERED that David L. Smith is suspended as a member of the Bar of this Court. It is

FURTHER ORDERED that when the United States Court of Appeals for the Tenth Circuit lifts its suspension of Mr. Smith, he shall be required to apply for reinstatement in accordance with D.C.COLO.LR 83.6N. of the Local Rules of Practice of this court. It is

FURTHER ORDERED that David L. Smith shall forward his certificate of admission to the Clerk of the Court within ten days from the date of this Order and that he shall in no way hold himself out as an attorney admitted to practice in this court be it by use of letterhead, business cards, advertisement or any other manner.

Dated at Denver, Colorado this 10th day of February, 1995.

BY THE DISCIPLINARY PANEL
OF THE COURT

Zita L. Weinshienk, Judge

Edward W. Nottingham, Judge

Daniel B. Sparr, Judge

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	
	)	No. 93-631
David L. Smith	)	
	)	

Order

Before Seymour, Chief Judge,
Baldock and Brorby, Circuit Judges

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 &

92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the ju gment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot

overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993).

Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific Corp., ____ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the Court

Per Curiam

United States Court of Appeals
for the Tenth Circuit

IN THE MATTER OF	)	Nos. 95-1091 &
DAVID L. SMITH,	)	95-1119
	)	(D.C. No. 93-DP-28)
Attorney-Appellant.	)	(D. Colo.)

ORDER

Before Tacha, Logan, and Kelly,
Circuit Judges

This matter comes on for consideration of Mr. Smith's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

All pending motions are denied.

Entered for the Court
PATRICK FISHER, Clerk

By:_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Disciplinary Action No. 93-DP-28

IN THE MATTER OF DAVID L. SMITH

ORDER CONCERNING POST-HEARING MOTIONS

David L. Smith is an attorney officed in Denver and licensed by the Colorado Supreme Court to practice law in Colorado. He was admitted to the bar of this court on February 11, 1977. On November 29, 1993, the United States Court of Appeals for the Tenth Circuit suspended Mr. Smith from the practice of law before the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct. 53 (1994). Upon receiving notification of the Tenth Circuit's action, this court's

Committee on Conduct (hereinafter called "the Committee") apprised Mr. Smith, on December 8, 1993, that this court would impose "simultaneous and identical discipline" unless he were to show cause in writing why the court should not do so. Mr. Smith, through counsel, responded to the notification, taking the position that this court should not discipline him at all. Some fourteen months later (February 10, 1995), the Disciplinary Panel of this court ordered that Mr. Smith be "suspended as a member of the Bar of this Court." In re Smith, Disciplinary Action No. 93-DP-28, Disciplinary Order at 1 (D. Colo. Feb. 10, 1995). The fourteen months was consumed by (1) a hearing before three members of the Committee, (2) two hearings before the Disciplinary Panel,

and (3) a stay of these proceedings while Mr. Smith unsuccessfully sought review of the Tenth Circuit's disciplinary order in the United States Supreme Court. The record before the Disciplinary Panel included briefs (with attachments and appendices), affidavits, transcripts of the hearing before the Committee, and documents received by the Committee. Both Mr. Smith and the Committee were afforded the opportunity to present evidence and argument to the Disciplinary Panel at each of the two hearings before the panel.

The matter is now before the Disciplinary Panel on four motions. Mr. Smith's attorneys, Phillip S. Figa and the firm of Burns, Figa & Will, P.C., have filed a "Motion to Withdraw" and a "Motion for Extension of Time and for

Stay of Enforcement of Disciplinary Order." Mr. Smith, acting pro se, has filed a "Verified Motion to Reconsider and/or to Vacate, or for an Emergency Stay of the District Court Disciplinary Panel Order During the Pendency of Mr. Smith's Appeal; Notice of Lost Certificate of Admission; Certificate of Compliance With D.C.COLO LR 7.1A." He has also filed a similar motion asking the Disciplinary Panel to vacate an ancillary order requiring him to pay the costs of the disciplinary proceeding. We will take up Mr. Smith's motions first.

We do not believe that Mr. Smith's myriad arguments--several of them advanced for the first time in his motion--merit reconsideration or vacation of the Disciplinary Order. Because Mr. Smith's arguments reflect a serious

misinterpretation of the Disciplinary Order and because we think all parties might benefit if we were to clarify our interpretation of the rule under which Mr. Smith was disciplined, we will attempt to explain the basis for the Disciplinary Order. This explanation will require that we first briefly discuss the background against which we are to interpret this court's current rules concerning conduct of attorneys practicing before the court. We expressly limit this discussion to operation of the rules as they apply to attorneys who are licensed to practice in Colorado by the Colorado Supreme Court (Mr. Smith's situation), not as they may apply to attorneys from other jurisdictions who are admitted to practice for a particular case or to

attorneys employed by the United States Department of Justice.

This court's rules concerning admission, conduct, and discipline of attorneys rely heavily on the rules and procedures adopted by the Colorado Supreme Court for admission, conduct, and discipline of attorneys licensed in this state. See, e.g., D.C.COLO.LR 83.5 (bar admission), 83.6 (rules of conduct and attorney discipline). This reliance is based partly on the recognition that standards for licensing of attorneys have traditionally been regarded as a matter of state concern, see, e.g., Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559, 1563 (10th Cir. 1993) (Oklahoma Supreme Court has exclusive jurisdiction in all matters involving the licensing and discipline of attorneys in Oklahoma), and partly on the

implicit acknowledgment that this court does not now possess the personnel or resources necessary to test and inquire into the background of applicants for admission or to investigate and prosecute all allegations of misconduct.

This court's reliance on the State of Colorado's procedures is illustrated by the rules on discipline of attorneys. While the rules do provide a procedure for filing, investigating, and pursuing a disciplinary complaint directly before this court, the procedure is rarely used. Most discipline is imposed under D.C.COLO.LR 83.6P., which outlines the procedure to be followed where this court receives notice that an attorney has been disciplined by another court (and which was the basis for imposing discipline on

Mr. Smith here). The rule provides, in pertinent part, as follows:

> P. ATTORNEY DISCIPLINED BY OTHER COURTS
>
> 1. Upon notice that any member of this court's bar has been disciplined by any state or other federal court, simultaneous and identical discipline shall be imposed by this court nunc pro tunc from the date of the other court's judgment. Within ten days of receiving letter notice of the automatic imposition of discipline, the attorney may show cause in writing why such discipline should not have been imposed.
>
> 2. It is presumed that any disciplinary action by another court against a member of this court's bar is appropriate, and the attorney has the burden to establish that this court should not impose simultaneous, identical punishment by proving, through clear and convincing evidence, that:

a. The procedure was so lacking in notice or opportunity to be heard that it denied due process; or

b. Imposition by this court of the same discipline would result in grave injustice; or

c. The kind of misconduct established has been held by this court to warrant substantially less severe discipline.

3. For purposes of these disciplinary rules the term "state or federal court" includes, without limitation, all courts of the United States, its states, commonwealths, territories and possessions.

D.C.COLO.LR 83.6P (emphasis supplied in the original).

Although this rule literally applies when an attorney is disciplined by any "state or federal court," we think the emphasized language concerning "simultaneous" discipline imposed "nunc

pro tunc" was probably drafted to operate in the situation most commonly presented to us, where the Colorado Supreme Court has suspended or disbarred an attorney licensed in Colorado. In this situation, the emphasized language works in a fashion which is fair to the attorney. It operates fairly for a very practical reason: an attorney who has been suspended or disbarred by the Colorado Supreme Court would probably violate that court's disciplinary order (or at least run a grave risk of doing so) were he to continue representing clients before this court. See Denver Bar Ass'n v. Public Utilities Comm'n, 391 P.2d 467, 471-72 (Colo. 1964)(giving examples of what constitute practice of law, including advice concerning applicable law and

drafting of documents requiring familiarity with legal principles); Colo. Rev. Stat. § 12-5-112 (1991) (practicing law without license deemed contempt of the supreme court). The realistic effect of his suspension or disbarment by the Colorado Supreme Court is that he is also prevented from practicing in this court. Imposing "simultaneous and identical" discipline "nunc pro tunc" recognizes this practical consequence of the Colorado Supreme Court's disciplinary order and means simply that the attorney's period of suspension or disbarment will likely be identical in both courts.

Suppose, for example, that the Colorado Supreme Court suspends an attorney for six months beginning July 1. We recognize, of course, that this

court's reciprocal order could never literally be "simultaneous" with the supreme court's discipline. We therefore interpret the words "simultaneous" and "nunc pro tunc" to mean that this court's order of suspension, whenever entered, would begin on July 1 and continue for six months, at the expiration of which the lawyer could apply for reinstatement to this court's bar. Imposition of "identical" discipline effective only as of the date of this court's order would, as a practical matter, be a suspension greater than six months, since the attorney effectively would have been barred from practicing in this court from the time of his suspension by the Colorado Supreme Court until six months from the date of this court's order. In short, the "simultaneous" and "nunc pro

tunc" language ordinarily benefits the attorney, because it insures that this court's discipline is truly "identical" to, not greater than, the supreme court's.

Since Mr. Smith was suspended by a court other than the Colorado Supreme Court, his situation is anomalous. Because he has not been disciplined by the Colorado Supreme Court, he remained perfectly free, even after the Tenth Circuit's suspension order of November 29, 1993, to practice law in Colorado; and, because he was not disciplined by this court until February 10, 1995, his practice could theretofore properly encompass representation of litigants in this court. These considerations led the Disciplinary Panel to omit any "nunc pro

tunc" or "simultaneous" language from the Disciplinary Order. Instead, the order is intended to take effect as of the date it was filed. It recites simply that this court is imposing discipline "identical" to the discipline imposed by the Tenth Circuit, that Mr. Smith "is suspended" (emphasis supplied in the original) as a member of this court's bar, and that he may apply for reinstatement when the Tenth Circuit "lifts its suspension."

In an apparent attempt to bolster his argument that rule 83.6P is unconstitutional, Mr. Smith urges that the rule requires discipline to be imposed "nunc pro tunc" and gives the Disciplinary Panel no room to vary. As he observes, the rules says that "simultaneous and identical discipline

shall be imposed . . . nunc pro tunc." D. Colo.R. 83.6P.1 (emphasis supplied in the original). The very next sentence, however, permits the attorney to "show cause in writing why such discipline should not have been imposed." Id. This would be a hollow provision if the Disciplinary Panel were required to ignore the attorney's submission and impose such discipline regardless of the showing he makes. Moreover, the next section of the rule allows the attorney to avoid "simultaneous, identical punishment" by showing that imposition of such discipline "would result in grave injustice." D.C.COLO.LR 83.6.P.2.b. We therefore conclude that the rule's use of the verb "shall" does not mandate "simultaneous" or "nunc pro tunc" discipline in every case. Our view is

supported by the principle of construction that the court should, if possible, give the rule a reasonable interpretation which avoids any potential constitutional difficulties. See, e.g., Hall v. Commissioner of Revenue, 30 F.3d 1304, 1306 (10th Cir. 1994)(it is "settled policy" in matters of statutory construction "to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question")(quoting Gomez v. United States, 490 U.S. 858, 864, 109 S.Ct. 2237, 2241 [1989]).

Having clarified our interpretation of the rule, we may dispose quickly of Mr. Smith's contention that the rule is constitutionally defective in multiple ways. Most of his claims are evidently

based on his mistaken view that the suspension order had some retroactive effect or that it was the Committee on Conduct who suspended him. None of these claims are buttressed by reference to pertinent case law, and we are unaware of any authority which would support them. They are therefore rejected.

Assuming that rule 83.6P is constitutional, Mr. Smith next argues (1) that the Tenth Circuit's procedures denied him due process of law, (2) that imposition of identical discipline would result in grave injustice, and (3) that the discipline meted out to him is more severe than that which this court has previously imposed for similar conduct. The last argument has the least merit, for we are aware of (and Mr. Smith has cited) no other instance where this court

has been confronted with the type of conduct which underlies the Tenth Circuit's disciplinary order. Because this case is unique, we are unable to say that this court has held this type of misconduct to warrant less severe discipline.

We are also not persuaded by Mr. Smith's first two arguments, either. Mr. Smith's suspension was preceded by notice and an opportunity to be heard which was sufficient to satisfy the Due Process Clause. Before it suspended him, the Tenth Circuit (1) issued an order directing him to show cause why he should not be suspended and (2) held oral argument in the case. He remains unsatisfied, urging that the court should have held an evidentiary hearing and/or appointed a special master to hear

evidence and make a recommendation. At such an evidentiary hearing, he says, he would have presented expert testimony concerning the question of whether his various actions before this court and the Tenth Circuit were "frivolous," as the Tenth Circuit found them to be. We think Mr. Smith's proposed expert testimony would have been wholly unnecessary. The Tenth Circuit's disciplinary order was premised on facts developed in the numerous cases which led to Mr. Smith's suspension, and the judgment that the various appeals filed by Mr. Smith were frivolous reflected a legal conclusion which the court drew from these facts. Opinion testimony from expert witnesses would have been superfluous.

Although Mr. Smith does not pursue the argument, his counsel has argued that

the Due Process Clause requires an evidentiary hearing because Mr. Smith wished to present evidence that he was financially unable to pay the monetary sanctions imposed upon him by this court and the Tenth Circuit. The argument is murky. It is not clear whether counsel is arguing that suspension of an impecunious lawyer creates an unconstitutional distinction based on the lawyer's wealth, see, e.g., Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079 (1966), or whether he is simply claiming that Mr. Smith's ability to pay the sanctions was one of the circumstances which the Tenth Circuit should have considered before suspending him. See, e.g., White v. General Motors Corp., 908 F.2d 675, 684-85 (10th Cir. 1990)(ability to pay should be considered

in ascertaining amount of Fed. R. Civ. P. 11 sanctions), cert. denied, 498 U.S. 1069, 111 S.Ct. 788 (1991). In neither event do we consider the argument persuasive because we do not believe his claimed inability to pay would be a matter which would either preclude his suspension or be otherwise relevant to the issue of whether to suspend him. The right to practice law is not a license to litigate vexatiously, cause needless expense to one's opponents and the publicly-funded court system, and then avoid paying for it all by pleading poverty. A court may condition the right to continue to practicing before it upon satisfaction of sanctions imposed for this type of conduct, and the attorney who engages in such conduct must be prepared to pay the sanction or forego

his right to practice. The Due Process Clause does not entitle Mr. Smith to a disciplinary hearing at which he could produce evidence of his inability to pay the underlying monetary sanctions.

Mr. Smith's final contention is that this court should not suspend him because this would, in the language of rule 83.6P, "result in grave injustice." The argument has two aspects. First, Mr. Smith continues to insist that he was disciplined for taking legal positions which would be perfectly valid in other circuits. Second, he asserts that it would be unjust to discipline him for failing to pay sanctions which he has no ability to pay.

Mr. Smith's claim that he has done nothing to warrant suspension and his reliance on McKnight v. General Motors

Corp., 114 S.Ct. 1826 (1994)(per curiam), demonstrate that he continues to misunderstand the Tenth Circuit's disciplinary order. In McKnight, the Supreme Court reviewed a Seventh Circuit decision which had (1) held that section 101 of the Civil Rights Act of 1991 was not retroactive and (2) imposed monetary sanctions on plaintiff's counsel for taking the "frivolous" position that the referenced section should operate retroactively. The Seventh Circuit had held the position frivolous because that court had already twice decided (with dissent) that the section was not retroactive. At the time of its two decisions, district courts were divided on the issue, and neither any other court of appeals nor the United States Supreme Court had dealt with the question. The

McKnight Court, having already decided in Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994), that section 101 was not retroactive, nonetheless vacated the sanction order, holding that, at the time the Seventh Circuit sanctioned plaintiff's counsel, the answer to the retroactivity question "was not so clear as to make petitioner's position frivolous." McKnight, 114 S.Ct. 1826.

Mr. Smith's case is not comparable to McKnight. Although he correctly asserts that courts of appeal are divided concerning the issue of whether an attorney sanctioned monetarily by a district court may take an interlocutory appeal from the sanction order, he overlooks the fact that one of the several appeals which the Tenth Circuit deemed frivolous did not even involve

this issue. See Casillan v. Regional Transp. Dist., 986 F.2d 1426 (10th Cir. 1993). Moreover, the Tenth Circuit's order suspending Mr. Smith was filed after the United States Supreme Court had denied his petition seeking resolution of the circuit conflict in one of the cases which did involve the issue. See Dunkin v. Louisiana-Pac. Corp., 114 S.Ct. 87 (1993). The Tenth Circuit's suspension order recited that, despite the Supreme Court's denial of the petition for a writ of certiorari in Dunkin, Mr. Smith had failed to pay "any of the sanctions . . . imposed on him by this court or the district court." In re Smith, 10 F.3d at 724. Thus, the Tenth Circuit suspended him "until all sanctions are paid." Id. We understand that the court of appeals disciplined Mr. Smith not solely because,

in order to preserve the issue for the Supreme Court review, he asserted a position frivolous in this circuit yet viable elsewhere, but also because he made no effort, even after the Supreme Court denied review in Dunkin, to pay the various sanction orders.

Mr. Smith's argument that the Tenth Circuit has disciplined him for merely taking a position that would be proper in other circuits fails to persuade us that our imposition of identical discipline "would result in grave injustice." Nothing in the course of events here indicates unfairness to Mr. Smith. He asked the court of appeals to reconsider its position concerning interlocutory review of sanction orders against lawyers. He was unsuccessful. He thereafter unsuccessfully sought Supreme

Court review. He has exhausted all avenues of appeal and must now comply with the sanction orders. Since he practices in this circuit, it matters not that other circuits permit interlocutory review of such orders. We do not think it unjust for a court of appeals to insist that attorneys admitted to its bar comply with its orders and follow its precedent.

The second aspect of Mr. Smith's argument concerning the "grave injustice" of identical discipline here is that it would be unfair to discipline him for failing to pay sanctions which he has no ability to pay. We have already peripherally discussed this argument during the course of ruling that the procedures used by the Tenth Circuit in disciplining Mr. Smith did not deprive

him of due process. Assuming nonetheless that inability to pay the sanctions would be relevant to the justice or injustice of identical discipline, we find that Mr. Smith has failed to carry his burden of proving financial inability to pay the sanctions. The record discloses that this was an important concern of the Committee on Conduct, and the Committee developed significant information on the issue. Although the Disciplinary Panel does not have data concerning Mr. Smith's income during most of 1994 and the first quarter of 1995, his affidavit discloses gross income of $40,000 during the first quarter of 1994, which (in the words of the Committee) is "not a paltry sum on either a stand-alone or annualized basis." He claims unspecified "personal and professional expenses" of $32,500, a

sum which includes fees incurred by fighting the various disciplinary proceedings. Even if we were to accept Mr. Smith's position that all these personal and professional expenses precluded payment of any monies toward satisfaction of the various sanctions, $7,500 remained from the first quarter earnings to at least make a good faith effort at beginning to pay the sanctions.

The information which Mr. Smith has furnished concerning his assets is equally unpersuasive. Having practiced law for over twenty years, he now claims that his assets consist of $325 in cash, $1,500 worth of clothing, a $1,500 watch, and a contingent interest in a judgment which he has obtained for a client. The apparent explanation for this lack of assets lies in the fact that, in March of

1993 (after various judges of this court had ordered him to pay substantial monetary sanctions), Mr. Smith transferred to his wife real estate and stock with a value which we calculate to be at least $120,000. According to Mr. Smith and his wife, Julia Hook, all of these transfers were made to satisfy antecedent debt incurred by virtue of the fact that Ms. Hook had supported Mr. Smith and performed legal services for him over the years of their marriage. If this is true, it represented a conscious decision by Mr. Smith to pay off some of his debt to his wife rather than satisfy monetary sanctions imposed on him by this court. It certainly does not support the inference that his poverty prevents payment of the sanctions. We therefore conclude that Mr. Smith has not shown

that this court's imposition of identical discipline would result in grave injustice.

Mr. Smith also requests a stay, pending appeal, of both the Disciplinary Order and the ancillary order requiring him to pay costs. He has not satisfied the conditions of obtaining a stay. Fed. R. Civ. P. 62(c), (d). His request for a stay is therefore denied.

Having addressed all aspects of Mr. Smith's motion, we now turn to his attorney's motion to withdraw. Mr. Smith opposes the motion on the ground that counsel has failed to represent him competently and should not be permitted to withdraw from a "mess of his (Mr. Figa's) own making." Under D.C.COLO.LR 83.6, rule 1.16 of the Colorado Rules of Professional Conduct govern counsel's

proposed termination of the attorney-client relationship. We find support in the record for the conclusion that termination of the relationship is proper on several grounds. They include the fact that Mr. Smith insists upon pursuing certain arguments which are not warranted under existing law and cannot be supported by a good faith argument for the modification or reversal of existing law, that Mr. Smith has rendered it unreasonably difficult for counsel to carry out his employment effectively, and that Mr. Smith has deliberately disregarded an agreement with counsel concerning fees. The motion to withdraw is well-founded.

Upon the findings and conclusions stated herein, it is

ORDERED as follows:

1. Mr. Smith's motion to reconsider or vacate the Disciplinary Order, and for other specified relief, is denied in its entirety.

2. Mr. Smith's motion to reconsider or vacate the ancillary order concerning costs, and for other specified relief, is denied in its entirety.

3. The motion of Mr. Figa and his firm to withdraw as counsel is granted.

4. The motion (filed by counsel) seeking an extension of time and a stay of the disciplinary order is denied.

Dated this 2nd day of May, 1995.

BY THE DISCIPLINARY PANEL
OF THE COURT:

ZITA L. WEINSHIENK, Judge

EDWARD W. NOTTINGHAM,
Judge

DANIEL B. SPARR, Judge

United States District Court
for the
District of Colorado

MAILING CERTIFICATE OF CLERK

93-DP-28

True and correct copies of the attached were mailed by the clerk to the following:

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Chief Judge Charles Matheson
Judge Patricia A. Clark
Judge Roland J. Brumbaugh
Judge Sidney B. Brooks
Judge Donald E. Cordova
Judge Marcia S. Krieger

Magistrate Judge Donald Abram
Magistrate Judge Richard M. Borchers
Magistrate Judge Bruce D. Pringle
Magistrate Judge O. Edward Schlatter

Patrick Fisher, Clerk, U.S. Court of Appeals

Bradford Bolton, Clerk, U.S. Bankruptcy Court

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Dated May 3, 1995 JAMES R. MANSPEAKER,
Clerk

by_____
Deputy